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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 230

ESTATE OF FRANK B. ANDERSON, THE BANK
OF CALIFORNIA, NATIONAL ASSOCIATION,
EXECUTOR,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MARSHALL P. MADISON,

FRANCIS R. KIRKHAM,

SIGVALD NIELSON,

Standard Oil Building, San Francisco, California,

Attorneys for Petitioner.

Table of Contents

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case.....	4
Specifications of Error	6
Reasons Relied on for the Allowance of the Writ.....	7
I. The decision of the court below is in conflict with decisions of the Circuit Courts of Appeals for the Second Circuit and the Fourth Circuit, and with a decision of the Court of Appeals for the District of Columbia	7
II. The decision of the court below is in conflict with the decision of the Supreme Court of California in Malmgren v. McColgan, 20 A. C. 454.....	10
III. The court below has decided an important question of federal law which has not been, but should be, settled by this court.....	12
Conclusion	13
Appendix	i

Table of Authorities Cited

Cases	Pages
Anderson's Estate v. Commissioner of Internal Revenue, 126 F. (2d) 46.....	2
County Nat. Bank & Trust Co. v. Helvering, 122 F. (2d) 29	9
Malmgren v. McColgan, 20 A. C. 454.....	9, 10, 13
Sitterding v. Commissioner of Internal Revenue, 80 F. (2d) 939	9, 10
Weber v. Commissioner of Internal Revenue, 111 F. (2d) 766, 40 B. T. A. 486.....	7, 8, 10

Statutes

Judicial Code, Sec. 240(a), as amended by Act of Feb. 13, 1925	2
Revenue Act of 1918:	
Sec. 213(b) (3)	6, 12n
Sec. 219	12n
Revenue Act of 1921:	
Sec. 213(b) (3)	12n
Sec. 219	12n
Revenue Act of 1924:	
Sec. 213(b) (3)	12n
Sec. 219	12n
Revenue Act of 1926:	
Sec. 213(b) (3)	12n
Sec. 219	12n
Revenue Act of 1928:	
Sec. 22(b) (3)	12n
Secs. 161, 162	12n
Revenue Act of 1932:	
Sec. 22(b) (3)	12n
Secs. 161, 162	12n
Revenue Act of 1934:	
Sec. 22(b) (3)	12n
Secs. 161, 162	12n
Revenue Act of 1936:	
Sec. 22(b) (3)	3, 6
Secs. 161, 162	3, i, ii, iii
Sec. 162(c)	2, 4, 5, 6, 7, 8

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ESTATE OF FRANK B. ANDERSON, THE BANK
OF CALIFORNIA, NATIONAL ASSOCIATION,
EXECUTOR,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice, and Associate Justices
of the Supreme Court of the United States:*

The above named petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on February 25, 1942.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 11) is a memorandum opinion and is not officially reported. The opinion of the Circuit Court of Appeals (R. 72) is reported in 126 F.(2d) 46.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 25, 1942 (R. 80). Rehearing was denied on April 17, 1942 (R. 81). The jurisdiction of this court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The estate of which petitioner is executor received a net income after certain adjustments of \$281,994.48 during 1936. During the same year the executor made final distribution to residuary legatees of all of the property of the estate in an amount greater than this amount of net income. In these circumstances is the estate entitled, in computing its net income, to a deduction under section 162(c) of the Revenue Act of 1936 of the amount of the income of the estate thus received and paid to legatees during the year 1936?

In more general terms, the question is whether the income of an estate in the taxable year in which the estate is finally distributed is taxable to the estate or to the legatees under section 162(c) of the Revenue Act of 1936.

STATUTES INVOLVED.

The statutes involved are section 22(b)(3) and sections 161 and 162 of the Revenue Act of 1936.¹

Section 22(b)(3) provides:

"22. Gross Income.

* * * * *

(b) **Exclusions from Gross Income.** The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) **Gifts, Bequests and Devises.** The value of property acquired by gift, bequest and devise, or inheritance (but the income from such property shall be included in gross income); * * *."

The full text of sections 161 and 162 are printed in the Appendix. The provisions particularly pertinent here are as follows:

"§161. Imposition of Tax.

(a) **Application of tax.** The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

¹Section 22(b)(3) of the Revenue Act of 1936 is derived from and is substantially similar to section 213(b)(3) of the Revenue Act of 1918, which is referred to in the opinion of the Circuit Court of Appeals (R. 76, 77).

Sections 161 and 162 of the Revenue Act of 1936 are substantially similar to section 219 of the Revenue Act of 1918, which is referred to in the opinion of the Circuit Court of Appeals (R. 76-79).

§162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate * * * there shall be allowed as an additional deduction in computing the net income of the estate * * * the amount of the income of the estate * * * for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary * * *.”

STATEMENT OF THE CASE.

Frank B. Anderson died on September 17, 1935, leaving an estate valued at \$2,242,855.54 (R. 33, 34). Petitioner was appointed executor of the estate (R. 33). All of decedent's property was community, and his widow, Elizabeth J. Anderson, was entitled to one half of it (R. 35). The remaining property was subject to decedent's will which, after certain specific bequests, directed the property to be distributed to petitioner, The Bank of California, National Association, as trustee (R. 26). The net income of the estate for 1936, after certain adjustments and without any deduction which might be allowed upon final distribution under section 162(c) of the Revenue Act of 1936, was \$281,994.48. During 1936 the estate made cash disbursements of \$853,564.19,² which included a total of \$528,643.93 for federal estate and state inheritance taxes (R. 56, 57).

²Erroneously stated (R. 13) as \$879,832.31—see R. 47-48.

The only cash remaining in the estate on December 30, 1936, the date of final distribution, amounted to \$68,770.05. Of this sum \$52,635.70 was paid for executor's commissions and attorneys' fees, \$1000.00 was paid to two specific legatees under the will; \$1500.00 was retained in the estate; and the balance of \$13,624.25 was distributed to the residuary legatees (R. 14, 29-32).

All of the assets of the estate and all of the receipts were commingled in a single account on the books of the estate (R. 13-14, 34).

On December 30, 1936, a decree of final distribution was made (R. 27-32), and, on the same day and pursuant to the decree, petitioner transferred to the widow the property to which she was entitled as her community interest and to itself, as trustee, the balance of the property (R. 35). The amount of property thus transferred exceeded the total net income of the estate for 1936 (R. 29-32).

Believing that this distribution of all of the assets then in its possession included both principal and such income as had come into its possession in 1936 and that the income was taxable to the distributees and not to the estate, petitioner as executor claimed the amount of such income as a deduction under section 162(c), *supra* (R. 26).

Respondent disallowed the deduction (R. 14-15, 60-64): the Board of Tax Appeals sustained the Commissioner's determination (R. 11-17); and the Circuit Court of Appeals affirmed the decision of the Board (R. 72-79).

The decision of the Board of Tax Appeals was based upon the grounds, (1) that during 1936 the executor paid out cash in an amount exceeding the income of the estate

and hence no income remained to be paid to the beneficiaries upon final distribution (R. 16), or, in any event, that petitioner had failed to prove that any income remained to be distributed to the legatees after payment of the liabilities of the estate (R. 17); and (2) that “no payment was made by the executor of the estate to the residuary legatee during the period of administration and settlement. The payment was made after the administration had been completed. What the petitioner received was his legacy. It was exempt from income tax” (R. 16).

The Circuit Court of Appeals affirmed the decision of the Board upon the second ground, holding that the deduction allowed by section 162(c) of the Revenue Act of 1936 does not apply to *any* payment, whether of corpus or income, made in settlement of an estate. The court reached this conclusion by reasoning that a payment, whether of corpus or income or both, *when such payment is made in settlement of an estate*, is a “bequest, devise, or inheritance” within the meaning of section 22(b)(3) of the Revenue Act of 1936 (section 213(b)(3) of the Revenue Act of 1918); that accordingly the income included in such payment must be taxable to the estate, since otherwise the income would wholly escape taxation, “something not contemplated by the Act” (R. 72-79).

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

1. In holding that the estate of Frank B. Anderson, deceased, is not entitled, in computing its income subject to tax, to deduct the entire amount of its net income received in 1936;

2. In holding that the amount of net income received by said estate during 1936 was not properly paid or credited during that year to legatees, within the meaning of section 162(c) of the Revenue Act of 1936;

3. In holding that the deduction provided in section 162(c) of the Revenue Act of 1936 does not apply to the distributions of income made by petitioner upon final distribution of said estate in 1936;

4. In holding that the income of said estate distributed to the residuary legatees in final distribution in 1936 is excluded from gross income subject to tax in the hands of such distributees;

5. In affirming the decision of the Board of Tax Appeals.

**REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT.**

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE FOURTH CIRCUIT, AND WITH A DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

In *Weber v. Commissioner of Internal Revenue* (2d C.C.A., 1940) 111 F.(2d) 766, the executor of the estate made distribution to residuary devisees of amounts of money representing the proceeds of the sale of assets in the corpus of the estate. This sale resulted in a taxable gain. As in the case at bar, the executor paid over the entire amount of the estate to the residuary devisees and claimed a deduction from the income of the estate under

section 162(c) of the Revenue Act of 1936. As in the case at bar, "If the tax fell on the estate, it was of course for a larger sum than the aggregate taxes paid by the three children" (111 F.(2d) 767), and the Commissioner sought to collect the tax from the estate. As in the case at bar, the Board of Tax Appeals sustained this determination upon the ground (40 B.T.A. 486, 489):

"Here the entire amount receivable by the beneficiaries (\$100,000 less expenses) came to them, not as income, but as a nontaxable 'bequest, devise, or inheritance.' Sec. 22(b) (3). The estate is not entitled to any deduction for such distributions."

The Circuit Court of Appeals, however, reversed the decision of the Board, holding (111 F.(2d), 768):

"The petitioner's second point is that even if the gain on sale of the farm was income of the estate in 1933, the gain was paid over in the same year to the three children and was deductible by the estate in computing net income by reason of section 162(c) of the Revenue Act of 1932, 26 U.S.C.A. Int. Rev. Code, § 162 (c). This point is also sound. * * *

The gain realized in 1933 was paid over in the same year by the executors to the children. Beyond doubt the payment was 'properly' made, for the children, whether or not they had title to the proceeds, had the right to an immediate distribution. We cannot grasp the commissioner's argument that the profit on the sale 'was never payable to them as such but was paid to them in discharge of their legacies.' The profit was payable to them as profit, because it was part of the proceeds of sale of the farm. * * * On the assumption that it was the estate which realized the profit, the case is squarely within section 162(c)."

This decision squarely rejects the ground upon which the court below decided the case at bar, namely, that amounts paid over in distribution are "paid to [the distributees] in discharge of their legacies" and that the amount of income included in such payments is, therefore, not taxable to the distributees but to the estate. The direct conflict between the instant decision and that in the *Weber* case is recognized and referred to in the opinion of the Supreme Court of California in *Malmgren v. McColgan*, 20 A.C. 454, which is hereinafter discussed (p. 10 et seq., *infra*).

The decision of the court below is also in conflict in result with the decision of the Court of Appeals for the District of Columbia in *County Nat. Bank & Trust Co. v. Helvering* (1941) 122 F.(2d) 29. In that case, which involved an estate probated in California, the tax on the estate income paid out upon final distribution was levied upon the distributee.

To the extent that the decision of the Circuit Court of Appeals may be deemed to be an approval of the first ground of decision by the Board of Tax Appeals (see pp. 5, 6, *supra*), it is contrary in principle to the decision of the Circuit Court of Appeals for the Fourth Circuit in *Sitterding v. Commissioner of Internal Revenue* (1936) 80 F.(2d) 939. In that case amounts received by the estate as income were accounted for and distributed to the residuary legatees as income. Nevertheless the court held that such amounts were not taxable to the distributees as income, because the estate for the taxable year in question had no net taxable income and therefore could not distribute any. The fact that the accounting methods used—

the actual book entries—showed that income was distributed as such, was held to be immaterial, the court saying (p. 941):

“* * * the rights of the parties can neither be established nor impaired by the bookkeeping methods employed. Mere bookkeeping entries cannot preclude the government from collecting its revenues, nor are such entries conclusive upon the taxpayer. The bookkeeping creates nothing, and the question must be decided according to proven and established facts.”

II.

**THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH
THE DECISION OF THE SUPREME COURT OF CALIFORNIA
IN MALMGREN v. McCOLGAN, 20 A.C. 454, P.(2d)**

Malmgren v. McColgan (1942) 20 A.C. 454, P.(2d), involved a factual situation substantially the same as that in the case at bar and arose under provisions of the California Personal Income Tax Act identical with the provisions of the federal statute here involved. The court held that the income of the estate for the taxable year in which final distribution occurred was taxable to the legatee and not to the estate. In reaching this conclusion the court followed the decision of the Circuit Court of Appeals for the Second Circuit in *Weber v. Commissioner of Internal Revenue* (111 F.(2d) 766, *supra*) and disapproved the contrary decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar. Among other things the court said (20 A.C., 458, 459):

“There remains the question whether the income retained its character as income when it was dis-

tributed to the legatees as part of the total assets. Income of an estate is clearly income to the legatees when distributed separately from the corpus of the estate. When it is distributed along with the corpus nothing occurs to alter its character. In either case it is merely transferred, not transformed. Before its distribution it is identified as income even though it is allied with the corpus as a constituent of the entire estate. It does not lose its identity after distribution to the legatees for whose benefit it has been held when it is allied with the corpus in distribution. The right of a legatee to the corpus vests at the death of the testator and 'residuary legatees who receive payments of funds composed both of original assets of the estate and of estate income, receive that portion represented by estate income as income derived from their own property.' * * *

Respondents contend, however, that the entire distribution constitutes a legacy no part of which can be regarded as income, * * *

This contention is answered by the decision in *Irwin v. Gavit*, 268 U.S. 161 * * *

Respondents have advanced the theory that a legatee is not taxable on income received by an estate unless he is entitled to have it paid to him at the time the estate receives it. No such limitation, however, can be found in either the federal or state acts, nor could it be read into these acts without nullifying paragraph (3) of section 12(d) of the state act as well as section 162(c) of the Internal Revenue Code."

While the decision in this case construed the provisions of the California Personal Income Tax Act and cannot, therefore, be considered as in conflict with the decision of the court below, we point out that the California Supreme Court construed the state statute in the light of its

understanding of the true meaning of the identical provisions of the federal act. The decision was written by Justice Traynor, a recognized authority on questions of federal as well as state income tax law, and is, we most respectfully submit, a correct exposition of the law. Beyond this, we emphasize that the decision establishes—in so far as state law may be deemed to be applicable to the rights of the parties—that the amount of income received by the estate in the instant case during 1936 remained income in the hands of the distributees upon final distribution.

III.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents federal questions of unusual importance which should be settled by this court. These questions are necessarily involved in virtually every final distribution of the estate of a decedent. They arise under every Revenue Act since 1917.³ For years confusion has existed as to the proper rules of taxation to be applied upon such distributions. The Commissioner of Internal Revenue has repeatedly taken conflicting positions, depending upon whether an assessment upon the estate or upon the beneficiaries would in the particular case yield a

³The pertinent provisions of all of the revenue acts since 1917 are identical in substance with the provisions of the Revenue Act of 1936 here involved. See: 1934 Act, secs. 22(b)(3), 161, 162; 1932 Act, secs. 22(b)(3), 161, 162; 1928 Act, secs. 22(b)(3), 161, 162; 1926 Act, secs. 213(b)(3), 219; 1924 Act, secs. 213(b)(3), 219; 1921 Act, secs. 213(b)(3), 219; 1918 Act, secs. 213(b)(3), 219.

greater tax.⁴ There are now pending many cases involving large sums of money in which the Commissioner has made inconsistent rulings.⁵ In the present state of the law, with conflicting decisions between the Circuit Courts of Appeals and with this conflict in decision emphasized by the decision of the Supreme Court of California in *Malmgren v. McColgan*, 20 A.C. 454, *supra*, litigation is inevitable in each case until the questions are settled by this court.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,

July 10, 1942.

MARSHALL P. MADISON,

FRANCIS R. KIRKHAM,

SIGVALD NIELSON,

Attorneys for Petitioner.

⁴For example, Estate of Charles N. Black and Estate of Alfred S. Tubbs, both of which are now before the Bureau, and in both of which your petitioner is executor. In both, on facts identical for present purposes to those found in this case, and in both of which the income, earned for that portion of the year preceding final distribution, was returned by the respective estates, the Commissioner has issued deficiency letters against the beneficiaries to whom distribution was made. Substantial amounts are involved. Your petitioner is informed that many instances of like inconsistent action on the part of the Commissioner, due to his uncertainty as to the proper law applicable on the facts presented, can be found in the Commissioner's files.

⁵See note 4, *supra*.

Appendix

REVENUE ACT OF 1936.

“Supplement E—Estates and Trusts

§161. Imposition of Tax

(a) **Application of tax.** The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) **Computation and payment.** The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

§162. Net Income

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement

of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Due service and receipt of a copy of the within is hereby admitted

this.....day of July, 1942.

.....
Attorney General of the United States,

.....
Assistant Attorney General of the United States,

.....
Chief Counsel of the Bureau of Internal Revenue,
Attorneys for Respondent.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:

<i>Burnet v. Whitehouse</i> , 283 U. S. 148	6
<i>County Nat. Bank & Trust Co. v. Helvering</i> , 122 F. (2d) 29 ..	7
<i>Malmgren v. McColgan</i> : 20 A. C. 454	7
<i>Sitterding v. Commissioner</i> , 80 F. (2d) 939	7
<i>Weber v. Commissioner</i> , 111 F. (2d) 766	6

Statute:

Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 161	2
162	2

[1]

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 230

ESTATE OF FRANK B. ANDERSON, DECEASED, THE
BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 11-17) is unreported. The opinion of the Circuit Court of Appeals (R. 72-79) is reported at 126 F. (2d) 46.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 25, 1942 (R. 80). A pe-

tition for rehearing was denied on April 17, 1942 (R. 81). The petition for a writ of certiorari was filed July 14, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income received by an estate in the year in which final distribution is made of the assets of the estate, is taxable to the estate or to the distributees.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary * * *.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and

on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT

The findings of the Board of Tax Appeals (R. 12-15) were based upon a stipulation of facts and joint exhibits (R. 25-64). They may be summarized as follows:

Frank B. Anderson died September 17, 1935, leaving an estate in excess of \$2,000,000. In his will he declared that all of his property was community property, one-half of which belonged to his wife, and, after certain specific bequests, he directed that the residue be paid to a bank in trust. Administration of the estate was completed on December 30, 1936 (R. 12).

During 1936 the estate had a net income of \$295,094.48 (before any deduction for distribution to beneficiaries) made up both of ordinary income and of capital gains. All the receipts and assets of the estate, capital and income alike, were mingled in a single account on the books of the estate. During 1936 the estate paid the beneficiary of a specific legacy of stock \$9,500 in dividends and paid another beneficiary an annuity of \$3,600 which the will directed to be paid out of income. During the same year the estate also made cash disbursements of \$853,564.10,¹ divided as follows: \$528,643.93 was paid for federal estate and state inheritance taxes and the remaining assets, after fees and expenses, were distributed in accordance with the will under the decree of final distribution entered by the probate court.² The will made no provision as to whether the death taxes should be paid from income or corpus and the executors made no book entries charging the taxes to either one. (R. 12-14.)

For the year 1936 the estate filed a fiduciary return claiming that it was not taxable on the income of the estate because it had been paid to the

¹ Erroneously stated by Board of Tax Appeals to be \$879,832.31 (R. 13).

² On the date of distribution, December 30, 1936, the only cash remaining in the estate amounted to \$68,770.05, from which \$52,635.70 was paid for executor's and attorneys' fees, \$1,000 for two legacies, \$1,500 was retained in the estate, and the balance of \$13,634.35 was distributed to the residuary legatees: \$11,692.17 to the widow and \$1,942.18 to the trust (R. 14).

legatees. The legatees filed returns including as their taxable income the amount shown as distributable to each on the return filed by the estate (R. 14). The Commissioner determined (R. 58-64) that the entire net income of the estate, less the \$13,100 distributed to specific legatees, was taxable to the estate (R. 14-15). Petitions for review filed by both the estate and the legatees were heard by the Board of Tax Appeals, which sustained the action of the Commissioner in taxing the estate and held that the legatees were not liable (R. 11-17). On appeal by the estate the court below affirmed (R. 72-79). No appeal was taken by the Commissioner from the decision in favor of the legatees.

ARGUMENT

It is certain that income received by an estate in the year of final distribution is taxable either to the estate or to the beneficiaries. Here the distributions made to the legatees during the taxable year were payments of residuary legacies and were not made as distributions of income. Neither the will nor state law gave any legatee a right to receive the income of the estate or required that death taxes be charged to the corpus. In fact the death taxes were paid from a common fund in which the executors had mingled both income and corpus. Consequently the court below held that the distributions to the legatees did not include income payable "as such" and, following

Burnet v. Whitehouse, 283 U. S. 148, concluded that the income was not taxable to the legatees but to the estate.

There is no conflict of decisions. *Weber v. Commissioner*, 111 F. (2d) 766 (C. C. A. 2), cited by petitioners, is distinguishable upon both grounds taken in that decision. The facts were that the executors sold real estate specifically devised to the testator's children and realized a profit which they distributed to the children in the same taxable year. The court held that the profit was taxable to the children to the exclusion of the estate. The chief ground of the decision was that under New York law the children owned the real estate so that entirely apart from section 162 the profit was not taxable to the estate. Whether such a ground could have been taken by the petitioner under California law in respect of the residue need not be considered for the point was not raised. The minor ground of decision in the *Weber* case was that the children were entitled to immediate distribution of the proceeds of the sale, both return of cost and profits, and that the payment of the proceeds was therefore deductible under section 162; "the profit was payable to them as profit, because it was part of the proceeds of sale of the farm" (111 F. (2d) at 768). In the instant case the income was not paid "as income"; the payments were made in distribution of the residue after an amount in excess of the

income had been paid for death taxes. The Supreme Court of California apparently overlooked these distinctions in *Malmgren v. McColgan*, 20 A. C. 454.

Likewise, there is no basis for petitioner's assertion (Pet. 9) that the decision below conflicts with *County Nat. Bank & Trust Co. v. Helvering*, 122 F. (2d) 29 (App. D. C.), and *Sitterding v. Commissioner*, 80 F. (2d) 939 (C. C. A. 4). Both cases held that distributions from an estate to the legatees were not to be considered as income paid and that the books of the estate were not conclusive as to the character of the payments.³ Both cases, therefore, are in full accord with the decision below.

CONCLUSION

There is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
GERALD L. WALLACE,

HARRY MARSELLI,

Special Assistants to the Attorney General.

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³ In the *County Nat. Bank* case a small part of the income was conceded by the legatee taxpayer to be taxable to him.